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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD,
Petitioner,

v.

COLLEGE SAVINGS BANK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICUS CURIAE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI

The Association of American Railroads ("AAR"), a railroad-industry trade association, respectfully submits this brief as *amicus curiae* in support of respondent College Savings Bank ("CSB"),[1] in order to reinforce the con-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae* and its members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to AAR's filing in letters on file with the Office of the Clerk of this Court.

stitutionality of the Patent and Plant Variety Protection Remedy Clarification Act's federal judicial remedy against the States, *see* 35 U.S.C. § 296 (1994) ("Patent Remedy Act"), and, more generally, to emphasize the importance of broad judicial deference to legislation abrogating state sovereign immunity through Congress's exercise of its power to enforce the substantive protections of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 5.

Although AAR and its members [2] do not have an immediate interest in the availability of relief under the Patent Remedy Act, they have a substantial interest in the principles underlying the decision of the U.S. Court of Appeals for the Federal Circuit in this case, particularly with respect to its application of *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), and the determination of the scope of congressional legislative authority under the Enforcement Clause of the Fourteenth Amendment. AAR's interest in these issues arises from its members' frequent reliance on Section 306 of the Railroad Revitalization and Regulatory Reform Act ("4-R Act"), 49 U.S.C. § 11501 (Supp. I 1995), which permits railroads to sue states in federal court to enjoin state taxation practices that invidiously discriminate against the railroad industry.

Following this Court's decision in *City of Boerne*, two federal courts of appeals, applying the principles of that case, have concluded that, in enacting Section 306, Con-

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[2] AAR is a voluntary, incorporated association of railroads operating in the United States, Canada and Mexico. Its members employ the substantial majority of railroad workers, operate a substantial majority of the linehaul mileage and account for virtually all of the freight revenues of all U.S. railroads. AAR frequently represents its member railroads before this Court (*see, e.g., El Paso Natural Gas Co. v. Neztsosie*, No. 98-6, Brief of *Amicus Curiae* AAR), lower courts, Congress and regulatory agencies and tribunals when matters of common concern are at issue.

gress properly abrogated the States' sovereign immunity from suit in federal court pursuant to a valid exercise of its Fourteenth Amendment enforcement power. *See Oregon Short Line R.R. v. Department of Revenue Oregon*, 139 F.3d 1259 (9th Cir. 1998); *Wheeling & Lake Erie Ry. v. Public Util. Comm'n of Pa.*, 141 F.3d 88 (3d Cir. 1998).[3] AAR, on behalf of the railroad industry, has an important and ongoing stake in ensuring that the federal judicial remedies enacted by Congress in Section 306 of the 4-R Act are not lost to the industry. It thus writes today to oppose the erosion of Congress's authority to deter and to remedy perceived violations of the Fourteenth Amendment advocated by the petitioners here and to ensure that the deferential principles of *City of Boerne* are properly applied in the context of this dispute.

SUMMARY OF ARGUMENT

The Federal Circuit properly held that the Patent Remedy Act effects a valid abrogation of state sovereign immunity pursuant to the Fourteenth Amendment. In order to find that Congress has enacted "appropriate" legislation to enforce the Fourteenth Amendment, this Court asks two relevant questions. First, the Court examines whether the legislation may be regarded as an enactment to enforce the substantive protections of the Amendment —that is, whether the ends sought to be accomplished by the legislation are legitimate under the Fourteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997).

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[3] This Court has pending before it two petitions for *certiorari* to review a decision of the Ninth Circuit, which applied the rule of *Oregon Short Line R.R.* to enjoin discriminatory taxation practices by the State of California. *See State Bd. of Equalization California v. Southern Pac. Transp. Co.*, No. 98-584 (petition filed Oct. 5, 1998); *State Bd. of Equalization California v. Atchison, Topeka & Santa Fe Ry.*, No. 98-1448 (petition filed Mar. 12, 1999).

Once legislation crosses this initial threshold, Congress may enact remedial legislation that prohibits not only unconstitutional, but also otherwise constitutional, state action. *City of Boerne*, 117 S. Ct. at 2162. The permissibility of such legislation is measured by a proportionality standard: "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 2164. So long as the congressional response to the constitutional threat is proportionate, the legislation is permissible under the Enforcement Clause of the Fourteenth Amendment.

The Patent Remedy Act meets this two-part *City of Boerne* standard. The ends served by the legislation are legitimate. The Patent Remedy Act targets state deprivation of property without due process. In enacting the Act, Congress could have concluded that patent holders were not afforded adequate remedies by each of the States for the infringement of their rights. Indeed, several states provided little or no remedy whatsoever for state patent infringements. Thus, Congress had the power to enact legislation to prevent these unconstitutional deprivations. Moreover, the Patent Remedy Act is a proportionate response to this constitutional threat. As applied in the majority of cases, the Act is designed to do nothing more than compensate patent holders for state infringement of their protected property interests.

Consequently, Congress's exercise of its enforcement power is entitled to deference in this Court. It should be upheld as "appropriate" legislation under Section 5 of the Fourteenth Amendment.

ARGUMENT

I. THE PATENT REMEDY ACT IS A PROPORTIONATE RESPONSE TO POTENTIAL DEPRIVATIONS OF DUE PROCESS BY THE STATES

After this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), congressional power to abrogate the States' sovereign immunity from suit in federal court is limited to legislation enacted under Section 5 of the Fourteenth Amendment ("Section 5"). Section 5 authorizes Congress "to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV, § 5. Unquestionably encompassed within this congressional authority is the power to enforce the Amendment's guarantee of due process of law: "The 'provisions of this article,' to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment." *City of Boerne*, 117 S. Ct. at 2163; *see also* Cong. Globe, 42nd Cong., 1st Sess. App. 83 (1871) ("The fourteenth amendment closes with the words, 'the Congress shall have power to enforce, by appropriate legislation, the provisions of this article'—the whole of it sir; all the provisions of the article; every section of it.") (statement of Rep. Bingham).

This Court has long viewed Congress's power under the enforcement clauses of the Civil War Amendments as equally broad as congressional authority under the Necessary and Proper Clause of Article I, § 8, cl. 18. *See Katzenbach v. Morgan*, 384 U.S. at 650. Shortly after the adoption of the Amendment, the Court explained the scope of congressional authority thereunder:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all per-

> sons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1879); *see also City of Boerne*, 117 S. Ct. at 2165.

The standard applied by the Court in determining whether legislation is "appropriate" under Section 5 was explained in *Katzenbach v. Morgan*, 384 U.S. at 651, and later refined in *City of Boerne*, 117 S. Ct. at 2164. The Court asks three questions in order to gauge whether legislation is "appropriate" under Section 5. First, the Court asks whether the legislation "may be regarded as an enactment to enforce" a substantive provision of the Fourteenth Amendment, such as the Equal Protection Clause or Due Process Clause. 384 U.S. at 651. Second, the Court inquires "whether it is 'plainly adapted to that end.'" *Id.* (citation omitted). Finally, the Court asks whether the legislation "is not prohibited by but is consistent with the 'letter and spirit of the constitution.'" *Id.* (footnote and citation omitted).

City of Boerne illuminated these standards. There, the Court considered whether Congress has the power to subject the States to the Religious Freedom Restoration Act ("RFRA") under Section 5. Congress enacted RFRA in response to this Court's decision in *Employment Div., Dept. of Human Resources Oregon v. Smith*, 494 U.S. 872 (1990), which held that laws of general applicability may incidentally burden religious practices even when not supported by a compelling governmental interest. *City of Boerne*, 117 S. Ct. at 2161. In RFRA, Congress drastically altered the governing standard, instead requiring that, where a generally-applicable law places a substantial burden on the free exercise of religion, that law

may survive only if justified by a compelling governmental interest and narrowly tailored to that interest. *Id.* at 2162.

The Court held that RFRA could not be justified as "appropriate" enforcement legislation under Section 5. In doing so, it expounded on the nature of Congress's "broad" power under that provision. *See id.* at 2163. In order to cross the initial threshold of permissibility under Section 5, legislation must "enforce" the provisions of the Fourteenth Amendment. *Id.* at 2164. "The Court has described this power as 'remedial.'" *Id.* That does not mean, however, that Congress is limited to enacting legislation that targets only state action previously found unconstitutional by the courts. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 210 (1980) ("It has never been seriously maintained, however, that Congress can do no more than the judiciary to enforce the Amendments' commands.") (Rehnquist, J., dissenting). Importantly, the *City of Boerne* Court reasoned that Congress may sweep broader than simply remedying judicially-adjudged violations of the Fourteenth Amendment:

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States."

Id. at 2163 (citation omitted). Thus, so long as the legislation targets some category of unconstitutional state action, it may in the course of prohibiting that conduct also prohibit some degree of otherwise constitutional conduct. *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 279 (1997) ("Congress pursuant to its § 5 remedial powers under the Fourteenth Amendment may abrogate sovereign immunity, even if the resulting

legislation goes beyond what is constitutionally necessary . . . .").

City of Boerne's recognition that "enforcement" legislation may sweep broader than the underlying violation sought to be remedied simply reiterated the Court's conclusion in prior Section 5 cases. In *Katzenbach v. Morgan*, the Court upheld as a valid exercise of the enforcement power legislation that banned English literacy requirements for voting in federal, state and local elections, despite its previous holding in *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959), that a state could impose a literacy requirement without running afoul of the Equal Protection Clause of the Fourteenth Amendment. *Morgan*, 384 U.S. at 649. The *Morgan* Court reasoned that *Lassiter* was "inapposite" to the "question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment." *Id.* Again, in *City of Rome*, the Court upheld under the Enforcement Clause of the Fifteenth Amendment congressionally mandated preclearance procedures for state and local voting practices that targeted, *inter alia*, practices that were discriminatory in effect. 446 U.S. at 177.[4] The Court reached this conclusion despite its prior indications that the Fifteenth Amendment prohibits only *intentional* discrimination. *See* 446 U.S. at 177 ("[W]e hold that the

[4] The Court has frequently stated that Congress's power to enforce the substantive protections of the Fifteenth Amendment is coextensive with its Fourteenth Amendment enforcement power. *See, e.g., Lopez v. Monterey County*, 119 S. Ct. 693, 709 n.6 (1999) (Thomas, J. dissenting) (citations omitted); *see also City of Boerne*, 117 S. Ct. at 2163 (discussing Fifteenth Amendment jurisprudence in context of determining scope of Fourteenth Amendment enforcement power).

Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 if the Amendment prohibits only intentional discrimination in voting."); *see also City of Mobile v. Bolden*, 446 U.S. 55, 66-69 (1980) (opinion of Stewart, J.); *id.* at 94 (opinion of White, J.). In each case, the Court upheld the legislation because Congress could conclude that, under certain circumstances, the state conduct prohibited would be deemed unconstitutional. *See City of Boerne*, 117 S. Ct. at 2167, 2168.[5]

Consequently, after *Boerne*, *Morgan*'s threshold determination of whether legislation "may be regarded as an enactment to enforce" the Fourteenth Amendment does not require a pre-enactment ruling that all of the practices prohibited by the legislation are unconstitutional. Rather, it merely requires that the legislation, as applied in some circumstances, would reach some subset of state conduct that likely would be unconstitutional. "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a *significant likelihood* of being unconstitutional." *City of Boerne*, 117 S. Ct. at 2170 (emphasis added). In that case, legislation will have crossed the Section 5 threshold and may be regarded as enforcement legislation.

[5] The *Boerne* majority did not invalidate RFRA on the grounds that the proffered justification for the statute—preventing state action that are "enacted with the unconstitutional object of targeting religious beliefs and practices," 117 S. Ct. at 2168—did not satisfy *Morgan*'s first inquiry. Rather, it apparently assumed, *arguendo*, that this perceived constitutional threat would permit Congress to enact legislation as a threshold matter. RFRA ultimately failed constitutional scrutiny, however, because it was a drastically disproportionate response to this legitimate constitutional threat. *See* discussion *infra* at 10-11.

That does not end the inquiry, however. Where the scope of legislation is not confined to that limited subset of unconstitutional state conduct but also prohibits otherwise constitutional state action, Section 5 does not rigidly demand invalidation. In those circumstances, *City of Boerne* looked to the second leg of the *Morgan* test—proportionality—to determine the legislation's validity. In order to fall squarely within the enforcement power, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 117 S. Ct. at 2164. As part of that inquiry, the Court examines the scope of the legislation and the qualifications and limitations placed upon its applicability by Congress. If sufficiently restricted in scope, application or remedy, legislation may be valid even if it "*pervasively prohibits* constitutional state action in an effort to remedy or prevent unconstitutional state action . . . ." *Id.* at 2170 (emphasis added).

Applying this proportionality test, *City of Boerne* held that RFRA fell well short of a proportionate response to the perceived threat of generally applicable laws passed because of religious bigotry. The law's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Id.* The law had no limitations whatsoever on its applicability, and it subjected state laws to the most "stringent" of constitutional standards—strict scrutiny. *Id.* at 2171. Consequently, the Court concluded that "[t]he substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted by *Smith*." *Id.*

In this case, the relevant *Morgan/City of Boerne* tests for determining "appropriateness" demonstrate that the congressional abrogation of state sovereign immunity effected by the Patent Remedy Act is valid. First, the legislation "may be regarded as an enactment to enforce" the Due Process Clause because it targets, *inter alia*, those states that fail to provide a remedy for state patent infringement. Second, it is a proportionate response to the perceived constitutional threat—deprivations of due process by the States.[6]

A. The Patent Remedy Act May Be Regarded as Section 5 Enforcement Legislation

In determining the validity of a particular abrogation of state sovereign immunity, the threshold inquiry is whether the Act may be regarded as "enforcement" legislation, that is, whether the "end" sought by the legislation is "legitimate." *See Morgan*, 384 U.S. at 650 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). This inquiry requires the Court to examine all of the potential applications of the legislation and ask whether, in any circumstances, the law targets state conduct or laws that "have a significant likelihood of being unconstitutional." *City of Boerne*, 117 S. Ct. at 2170.

Petitioner would ask a different question. It argues that the Patent Remedy Act cannot be deemed appropriate under the Enforcement Clause because it does not target unconstitutional state action *in this case*. That is, because Florida courts allegedly provide a remedy for patent infringement, patent holders cannot argue that they

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[6] Of course, in every case, the Court must also consider *Morgan*'s third test: whether the law is otherwise consistent with the letter and spirit of the constitution. In this case, there are no serious claims apart from the Section 5 challenge that Congress's power to enact patent laws is inconsistent with the constitution. Thus, this third *Morgan* standard is not addressed herein.

have been deprived of property "without due process of law." *See* Brief of Petitioners at 27-28 ("Pet. Br."). Petitioner's formulation of the inquiry is inconsistent with the standards applied in *City of Boerne*, which recognized that Congress may enact legislation that sweeps broader than a targeted constitutional violation, 117 S. Ct. at 2163, and that Congress must have "wide latitude" in determining whether legislation should be considered "enforcement" legislation. *Id.* at 2164. Consequently, the question of whether the particular state challenging the Patent Remedy Act provides a remedy for its infringements, while potentially relevant to the issue of proportionality, does not speak to the threshold issue of Congress's power to enforce the Due Process Clause. *See Morgan*, 384 U.S. at 649 (determining appropriateness of congressional exercise of enforcement power "[w]ithout regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement"). Instead, where legislation is directed at potential due process violations by the States, the Court must examine *each* state's law to determine whether the perceived threat is real.

The petitioner's (and its *amici*'s) primary complaint is that Congress did not adequately consider the possibility that states already provided an adequate post-deprivation remedy to injured patent holders; thus, the Patent Remedy Act could not conceivably be deemed appropriate enforcement legislation under Section 5. As an initial matter, the fact that Congress did not specifically describe circumstances in which states had previously infringed patent rights without providing due process for redressing those injuries cannot, of itself, invalidate the law. As this Court has repeatedly held, judicial deference to Congress's exercise of its enforcement power "is based not on the state of the legislative record Congress compiles but on

'due regard for the decision of the body constitutionally appointed to decide.'" *City of Boerne*, 117 S. Ct. at 2170 (quoting *Oregon v. Mitchell*, 400 U.S. at 207 (opinion of Harlan, J.)); *cf. EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). Consequently, the inquiry must be whether Congress *could have* found, at the time of enactment, that some states were not affording due process to parties injured by the state's patent infringements.

Based on the state law existing at the time of enactment, Congress could easily have found that some states did not provide adequate process to parties injured by a state's patent infringement. In some cases, state legal remedies for patent infringement were non-existent, while in others, they were seriously questionable or otherwise inadequate. Neither petitioner nor its *amici* deny this, arguing instead that *most* states provided *some* remedy for state torts. *See, e.g.*, Brief of *Amici Curiae* States of Ohio *et al.* at 8 ("Ohio Br.") ("Indeed, *virtually* all the States have waived their sovereign immunity to *some extent* in their own courts or at least have provisions for 'takings,' 'inverse condemnation,' or tort claims in some forum.") (emphasis added).

Indeed, an examination of the comprehensive list of state laws provided by *amici* States of Ohio *et al.* in Appendix B to their brief demonstrates that potential due process violations loomed large at the time of enactment of the Patent Remedy Act:

- In West Virginia, the state constitution forecloses any relief against the state in state courts: "The State of West Virginia *shall never be made defendant in any court of law or equity* . . . ." W. Va. Const. art. VI, § 35.[7] Accordingly, the state

[7] The state constitutional and statutory provisions discussed in this section are reproduced in relevant part in an appendix to this brief.

tort claims act waives sovereign immunity from suit only for "political subdivisions" of the state, and not the state itself. *See* W. Va. Code Ann. § 29-12A-4. Thus, West Virginia apparently provides *no process* for a party injured by the state's patent infringement.

- Similarly, in Colorado, the state's waiver of sovereign immunity is specifically limited by statute to a narrow class of tortious acts, such as negligent operation of a motor vehicle, which apparently do not include tortious interference with a property right, such as a patent. *See* Colo. Rev. Stat. Ann. § 24-10-106. Nor would Colorado's inverse condemnation statute, which is limited to actions relating to "real property," permit recovery for patent infringement. *See* Colo. Rev. Stat. Ann. § 24-56-116.
- Maine's legislative waiver of sovereign immunity is similarly limited by a general rule against waiver, with certain limited exceptions that do not include patent infringement actions or their equivalent common law claim. *See* Me. Rev. Stat. Ann. tit. 14, §§ 8103, 8104-A.
- Wyoming's law is to the same effect. *See* Wyo. Stat. Ann. § 1-39-104 through -112 (limited waiver of sovereign immunity); Wyo. Stat. Ann. § 1-26-516 (inverse condemnation for improper possession of or damage to "land").
- Maryland's law limits liability for claims against the state to $100,000, a value that could be severely inadequate in many cases of patent infringement. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-522(a)(5).
- Many states provide "good faith" or discretionary function exceptions to their sovereign immunity waivers that would exempt state patent infringements where the state acts in the exercise of due care or in the performance of a discretionary function under a valid state law. *See, e.g.*, Ind. Code § 34-14-4-4(6), (8); Minn. Stat. Ann. § 3.736; Tenn. Code Ann. §§ 29-20-201, 29-20-205; Ga. Code Ann. § 50-21-24(1)-(2); Del. Code § 4001(1)-(2).

- Many of the state inverse condemnation statutes relied upon by *amici*, like those in Colorado and Wyoming, permit recovery only for injuries to "real property." *See, e.g.*, Conn. Gen. Stat. Ann. § 48-17b; Haw. Rev. Stat. Ann. § 113-4; Miss. Code Ann. § 43-37-9; N.C. Gen. Stat. §§ 40A-2(7), 40A-51.

Against this backdrop, Congress clearly could have concluded that a federal remedy was necessary both to "deter[]" and to "remed[y]" possible state action that had a "significant likelihood of being unconstitutional." *See City of Boerne*, 117 S. Ct. at 2163, 2170. It is wholly unrealistic to expect that, in any context, the laws of every State in the Union will be inadequate to protect due process rights. Insistence on such a circumstance as a precondition to Congress's exercise of its Section 5 enforcement powers would, as a practical matter, eviscerate that power. This Court's Section 5 decisions do not so limit congressional authority. *See id.* at 2162.[8] Here,

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[8] This does not mean that no legislation will ever fail *Morgan*'s "legitimacy" inquiry. For example, in the *Civil Rights Cases*, 109 U.S. 3 (1883), this Court held that the "public accommodation" provisions of the Civil Rights Act of 1875 were invalid enactments under Section 5 of the Fourteenth Amendment. The challenged sections of the Act prohibited private conduct that discriminated against individuals on account of race or color in the provision of public accommodations. *Id.* at 9-10. The Court found that Congress did not have the authority to enact the legislation because, *inter alia*, the prohibited conduct did not rise to the level of state action. *Id.* at 13. Thus, under *no circumstances* could the Fourteenth

many state laws existing at the time of the enactment of the Patent Remedy Act were wholly inadequate to deal with potential infringements upon a patent holder's rights by these states. Accordingly, regardless of whether the State of Florida provided adequate remedies, the end sought by the Patent Remedy Act, providing due process of law to parties injured by a state's patent infringment, is legitimate. The Patent Remedy Act thus is properly regarded as an enactment to remedy and to prevent these possible due process violations.[9]

B. The Patent Remedy Act Is a Proportionate Response to the Perceived Constitutional Threat

Once *Morgan*'s threshold determination is met, the Court then asks whether the legislation is a proportionate

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Amendment be viewed as prohibiting the conduct targeted by the legislation. *See also United States v. Harris*, 106 U.S. 629, 640 (1883) ("As . . . the section of the law under consideration is directed *exclusively* against the action of private persons, without reference to the laws of the State[,] or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution.") (emphasis added). Similarly, in *Wilson-Jones v. Caviness*, 107 F.3d 358 (6th Cir. 1997), the Court held that states could not be sued in federal court under an amendment to the Fair Labor Standards Act ("FLSA") because the provisions of the Act were impermissible under Section 5. There, as with the *Civil Rights Cases*, it was impossible to conceive of a circumstance in which Congress could have concluded that the relevant provisions of the Act, which mandated minimum wage and maximum hours for state employees, were targeted at unconstitutional state conduct. The Equal Protection Clause would permit the classifications drawn by the FLSA in all circumstances. Thus, the ends sought to be achieved by the FLSA, as applied to the states, were illegitimate.

9 Petitioner also argues that the legislation cannot be justified because it neither protects a protectible property interest nor targets unconstitutional intentional deprivations. Because these issues appear to relate solely to the specific statute at issue here, and do not raise issues potentially affecting the railroad industry, AAR does not address those issues in this brief.

response to the constitutional violations targeted. *City of Boerne*, 117 S. Ct. at 2164. In making this inquiry, *City of Boerne* recognized that "preventive rules are sometimes appropriate remedial measures." *Id.* at 2169; *see also College Sav. Bank v. Florida Prepaid Postsecondary Edu. Expense Bd.*, 148 F.3d 1343, 1351 (Fed. Cir. 1998) ("We do not read the precedent to permit abrogation of the state's immunity only in those instances in which a state provides no due process in its own courts to redress the alleged misconduct."). Against the harm sought to be redressed by the legislation, the Court balances the degree of intrusion of the legislation upon state conduct, including whether the legislation "affect[s] a discrete class of state" action, the scope of the "litigation burden on the States," and the degree to which the legislation curtails the States' "general regulatory power." 117 S. Ct. at 2170-71. Legislation that is tailored in its scope and remedy is more likely to be constitutional than the pervasive and draconian legislation struck down in *City of Boerne*.

The Patent Remedy Act meets this proportionality standard. First, the remedies provided by the Act are proportionate to the type of harm inflicted. For instance, although treble damages are permitted under the Act, they are only permitted where the state's conduct in infringing a patent is found to be willful and deliberate. 35 U.S.C. §§ 284-85 (1994). In all other cases, damages are limited to those necessary to compensate the patent holder for the infringement. *Id.* § 284.

Second, the scope of the Act does not remotely resemble the scope of RFRA, invalidated in *City of Boerne*. There, RFRA potentially applied to every single piece of state legislation and prohibited all manner of official action. 117 S. Ct. at 2170. Here, by contrast, state patent infringements are likely confined to a narrow class of

state conduct, primarily where the state conducts itself as a commercial actor. *See* Pet. App. A at 24a.

Finally, according to the petitioner's own argument, the litigation burden imposed by the legislation should be relatively minor. As petitioner argues, the Federal Circuit's opinion pointed to only "eight instances between 1887 and 1990 where states have been sued for patent infringement." Pet. Br. at 27. Thus, the patent infringement litgation burden on the states to date has been inconsequential. This empirical evidence demonstrates that, unlike RFRA, the Patent Remedy Act does not exact "substantial costs" or "impos[e] . . . heavy litigation burden[s] on the States." 117 S. Ct. at 2171.

Doubtless, Congress could have provided a more tailored remedy against the States in the Patent Remedy Act. But the Fourteenth Amendment Enforcement Clause does not require a perfect fit, nor does it permit this Court to substitute in a wholesale manner its judgment for that of Congress. Section 5 legislation does not require "termination dates, geographic restrictions or egregious predicates" to pass constitutional scrutiny. *City of Boerne*, 117 S. Ct. at 2170. These limitations merely aid this Court in reviewing the permissibility of congressional action. In the "first instance," however, Congress must " 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Id.* at 2172 (citation omitted). The Court must perform its judicial review function against the "presumption of validity [that congressional] enactments now enjoy." *Id.* It is only where the remedy created by congressioanl legislation so overreaches the unconstitutional evil addressed by the legislation that the Court may invalidate the legislation.

II. PETITIONER CORRECTLY CITES SECTION 306 OF THE 4-R ACT AS AN EXAMPLE OF A PROPER CONSTITUTIONAL ABROGATION OF STATE SOVEREIGN IMMUNITY

While AAR disagrees with petitioner regarding the constitutionality of the Patent Remedy Act, AAR shares common ground with petitioner on one crucial point: that Section 306 of the 4-R Act, 49 U.S.C. § 11501—the statute that prompted AAR to file this *amicus* brief—presents an even more compelling case of "appropriate" legislation to enforce the Fourteenth Amendment. In its brief on the merits, petitioner cites *Wheeling & Lake Erie Ry.*, 141 F.3d 88—in which the Third Circuit upheld Section 306 as a valid exercise of congressional enforcement power under the Fourteenth Amendment—as an example of cases in which lower courts have found "the existence of unconstitutional behavior to justify § 5 legislation." Pet. Br. at 22. Similarly, in its petition for writ of *certiorari*, petitioner described Section 306 as a statute directed at state conduct by which "traditional guarantees of the Fourteenth Amendment were very closely implicated." Cert. Pet. at 13 (citing *Wheeling*).

As every court of appeals that has reached the issue has held, Section 306 is indeed a classic case of Congress's use of its Section 5 enforcement power to remedy a violation of the Fourteenth Amendment's substantive protections—in this case, the Equal Protection Clause. *See Wheeling*, 141 F.3d 88; *Oregon Short Line R.R.*, 139 F.3d 1259. In that statute, Congress sought to remedy what it perceived to be invidious discrimination by the States against interstate railroads: "Unfortunately, interstate carriers, especially railroads, are easy prey for State and local tax assessors. Railroads, oil pipelines, and other interstate carriers are nonvoting, often nonresident, targets for local taxation, and cannot easily remove their

right-of-way and terminals." S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969). Confronted with evidence that "the railroads ha[d] been assessed more than $900 million in discriminatory taxes" during a nine-year period ending in the late 1960's, *id.* at 3, and the absence of a "plain, speedy, and efficient remedy," in state or federal courts, *id.* at 7, Congress enacted legislation providing a modest remedy—the right to sue an offending state in federal court "to prevent a violation" of the 4-R Act's prohibition against discriminatory state taxation of railroads. *See* 49 U.S.C. § 11501(c).

As petitioners' argument implies, Section 306 is the paradigm of a proportionate congressional response to a perceived constitutional threat. *See City of Boerne*, 117 S. Ct. at 2164. The legislation was enacted to address what Congress perceived as impermissible discrimination against a discrete class of individuals. As one court that has upheld the Act reasoned, "there can be little doubt that discriminatory state taxation can implicate equal protection concerns." *Oregon Short Line R.R.*, 139 F.3d at 1266.

Congress's goal in adopting Section 306—preventing invidious discrimination against the railroads—is, as petitioner itself recognizes, clearly a legitimate Fourteenth Amendment objective. In examining state taxation practices regarding interstate railroads, Congress could have determined that state practices violated the Equal Protection Clause in numerous circumstances. First, states run afoul of the constitutional guarantee of equal protection by subjecting railroads as a class to invidious discrimination. *See Morgan*, 384 U.S. at 656 ("[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that [the challenged state law] . . . constituted an invidious discrimination in violation of the Equal Protection Clause."); *see also United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 553 (5th Cir. 1980) ("Congress's power under Section 5 of the fourteenth amendment clearly extends to protection of any group of persons invidiously discriminated against by state law . . . ."), *cert. denied*, 451 U.S. 1002 (1981); *Wilson-Jones*, 99 F.3d at 210 n.4 (noting that enforcement legislation may be more appropriate "if Congress made findings that a particular group needed legal protection to remedy some sort of invidious discrimination not directly addressed by federal precedent").

Second, Congress could also have determined that states violated the equal protection clause where they applied otherwise neutral state tax laws in a discriminatory manner against the railroads. *See Allegheny-Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989). Thus, to the extent Section 306 addresses the unequal assessment practices of the States, its purpose is clearly legitimate under the equal protection clause.

Section 306 is also a classic example of a proportionate legislative response to Congress's legitimate perception of unconstitutional discrimination by the States. Its remedial provisions are narrowly tailored "to prevent[ing] a violation" of the 4-R Act's anti-discrimination provisions. 49 U.S.C. § 11501(c). Thus, railroads generally have recourse only to non-monetary, equitable and declaratory relief.[10] Moreover, courts are not permitted to enjoin collection or assessment of all state railroad taxes, but only the discriminatory portion of the state tax. Finally, Section 306 permits relief only where railroads can show

[10] *See* Pub. L. No. 94-210, § 306(2), 90 Stat. 31, 54 (1976) (permitting federal courts "to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of" Sction 306).

that the assessed value of their property is at least five percent greater than similar commercial and industrial property. 49 U.S.C. § 11501(c). Thus, where there is only a minimal level of discrimination, federal courts have no power to interfere under Section 306, even if that discrimination might itself violate the Equal Protection Clause.

An analysis of Section 306 thus confirms the appropriateness of the two-part test applied by this Court in *City of Boerne* for determining whether congressional abrogation of sovereign immunity is "appropriate" under Section 5. Petitioners' efforts to undermine that test and to erode the authority of Congress to deter and to remedy violations of the Fourteenth Amendment should be rejected.

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the Federal Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

Colo. Rev. Stat. Ann. § 24-10-106. Immunity and partial waiver

(1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type or the form of relief chosen by the claimant except as provided otherwise in this section. Sovereign immunity is waived by a public entity in an action for injuries resulting from:

(a) The operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of employment, except emergency vehicles operating within the provisions of section 42-4-108(2) and (3), C.R.S.;

(b) the operation of any public hospital, correctional facility, as defined in section 17-1-102, C.R.S., or jail by such public entity;

(c) A dangerous condition of any public building;

(d)(I) A dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic on the paved portion, if paved, or on the portion customarily used for travel by motor vehicles, if unpaved, of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any highway which is a part of the federal secondary highway system, or of any highway which is a part of the state highway system on that portion of such highway, road, street, or sidewalk which was designed and intended for public travel or parking thereon. As used in this section, the phrase "physically inter-

feres with the movement of traffic" shall not include traffic signs, signals, or markings, or the lack thereof. Nothing in this subparagraph (I) shall preclude a particular dangerous accumulation of snow, ice, sand, or gravel from being found to constitute a dangerous condition in the surface of a public roadway when the entity fails to use existing means available to it for removal or mitigation of such accumulation and when the public entity had actual notice through the proper public official responsible for the roadway and had a reasonable time to act.

(II) A dangerous condition caused by the failure to realign a stop sign or yield sign which was turned, without authorization of the public entity, in a manner which reassigned the right-of-way upon intersecting public highways, roads, or streets, or the failure to repair a traffic control signal on which conflicting directions are displayed;

(III) A dangerous condition caused by an accumulation of snow and ice which physically interferes with public access on walks leading to a public building open for public business when a public entity fails to use existing means available to it for removal or mitigation of such accumulation and when the public entity had actual notice of such condition and a reasonable time to act.

(e) A dangerous condition of any public hospital, jail, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical, power, or swimming facility. Nothing in this paragraph (e) or in paragraph (d) of this subsection (1) shall be construed to prevent a public entity from asserting sovereign immunity for an injury caused by the natural condition of

any unimproved property, whether or not such property is located in a park or recreation area or on a highway, road, or street right-of-way.

(f) The operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by such public entity.

(1.5)(a) The waiver of sovereign immunity created in paragraphs (b) and (e) of subsection (1) of this section does not apply to claimants who have been convicted of a crime and incarcerated in a correctional facility or jail pursuant to such conviction, and such correctional facility or jail shall be immune from liability as set forth in subsection (1) of this section.

(b) The waiver of sovereign immunity created in paragraphs (b) and (e) of subsection (1) of this section does apply to claimants who are incarcerated but not yet convicted of the crime for which such claimants are being incarcerated if such claimants can show injury due to negligence.

(2) Nothing in this section or in section 24-10-104 shall be construed to constitute a waiver of sovereign immunity where the injury arises from the act, or failure to act, of a public employee where the act is the type of act for which the public employee would be or heretofore has been personally immune from liability.

(3) In addition to the immunity provided in subsection (1) of this section, a public entity shall also have the same immunity as a public employee for any act or failure to act for which a public employee would be or heretofore has been personally immune from liability.

(4) No rule of law imposing absolute or strict liability shall be applied in any action against a public entity or

a public employee for an injury resulting from a dangerous condition of, or the operation and maintenance of, a public water faciilty or public sanitation facility. No liability shall be imposed in any such action unless negligence is proven.

Colo. Rev. Stat. Ann. § 24-56-116. Inverse condemnation proceedings

Where an inverse condemnation proceeding is instituted by the owner of any right, title, or interest in real property because of the alleged taking of his property for any program or project for which federal financial assistance will be available to pay all or any part of the cost of the program or project, the court rendering a judgment for the plaintiff in such proceeding and awarding compensation for the taking of property or the attorney for the acquiring agency effecting a settlement of any such proceeding shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of such proceeding.

Conn. Gen. Stat. Ann. § 48-17b. Inverse condemnation. Plaintiffs award

The state court rendering a judgment for the plaintiff in an inverse condemnation proceeding brought against the state by the owner of real property, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceeding.

Del. Code § 4001(1)-(2). Limitation on civil liability

Except as otherwise provided by the Constitutions or laws of the United States or of the State, as the same may expressly require or be interpreted as requiring by a court of competent jurisdiction, no claim or cause of action shall arise, and no judgment, damages, penalties, costs or other money entitlement shall be awarded or assessed against the State or any public officer or employee, including the members of any board, commission, conservation district or agency of the State, whether elected or appointed, and whether now or previously serving as such, in any civil suit or proceeding at law or in equity, or before any administrative tribunal, where the following elements are present:

(1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over whom the public officer, employee or member shall have supervisory authority;

(2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and

(3) The act or omission complained of was done without gross or wanton negligence;

provided that the immunity of judges, the Attorney General and Deputy Attorneys General, and members of the General Assembly shall, as to all civil claims or causes of action founded upon an act or omission arising out of the performance of an official duty, be absolute; provided further that in any civil action or proceeding against the State or a public officer, employee or member of the State, the plaintiff shall have the burden of proving the absence of 1 or more of the elements of immunity as set forth in this section.

Ga. Code Ann. § 50-21-24(1)-(2). Exceptions to state liability

The state shall have no liability for losses resulting from:

(1) An act or omission by a state officer or employee exercising due care in the execution of a statute, regulation, rule, or ordinance, whether or not such statute, regulation, rule, or ordinance is valid;

(2) The exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused;

* * * *

Haw. Rev. Stat. Ann. § 113-4. Proceeding by owner

Where an inverse condemnation proceeding is instituted by the owner of any right, title or interest in real property because of use of the owner's property in any program or project in which federal or federal-aid funds are used, the court, rendering a judgment for the plaintiff in such proceeding and awarding compensation for the taking of property, or the State's attorney effecting a settlement of any such proceeding, shall determine and award or allow

to such plaintiff, as a part of such judgment or settlement, such sums as will, in the opinion of the court or the State's attorney, reimburse such plaintiff for the plaintiff's reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceeding.

Ind. Code § 34-13-3-3(6), (8). Losses for which governmental entity or employee not liable

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from:

* * * *

(6) the performance of a discretionary function; however, the provision of medical or optical care, as provided in, IC 34-6-2-38 shall be considered as a ministerial act;

* * * *

(8) an act or omission performed in good faith and without malice under the apparent authority of a statute which is invalid, if the employee would not have been liable had the statute been valid;

* * * *

Md. Code Ann. Cts. & Jud. Proc. § 5-522(a)(5). State and its personnel and units

(a) Tort liability—Exclusions from waiver under § 12-104 of the State Government Article. —Immunity of the State is not waived under § 12-104 of the State Government Article for:

* * * *

(5) A claim by an individual arising from a single incident or occurrence that exceeds $100,000;

* * * *

Me. Rev. Stat. tit. 14, § 8103. Immunity from suit

1. Immunity. Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages. When immunity is removed by this chapter, any claim for damages shall be brought in accordance with the terms of this chapter.

Me. Rev. Stat. tit. 14, § 8104-A. Exceptions to immunity

Except as specified in section 8104-B, a governmental entity is liable for property damage, bodily injury or death in the following instances.

1. OWNERSHIP; MAINTENANCE OR USE OF VEHICLES, MACHINERY AND EQUIPMENT. A governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or use of any:

A. Motor vehicle, as defined in Title 29-A, section 101, subsection 42;

B. Special mobile equipment, as defined in Title 29-A, section 101, subsection 70;

C. Trailers, as defined in Title 29-A, section 101, subsection 86;

D. Aircraft, as defined in Title 6, section 3, subsection 5;

E. Watercraft, as defined in Title 12, section 662, subsection 12;

F. Snowmobiles, as defined in Title 12, section 7821, subsection 5;

G. Other machinery or equipment, whether mobile or stationary.

The provisions of this section do not apply to the sales of motor vehicles and equipment at auction by a governmental entity.

2. PUBLIC BUILDINGS. A governmental entity is liable for its negligent acts or omissions in the construction, operation or maintenance of any public building or the appurtenances to any public building. Notwithstanding this subsection, a govermental entity is not liable for any claim which results from:

A. The constructon, ownership, maintenance or use of:

(1) Unimproved land;

(2) Historic sites, including, but not limited to, memorials, as defined in Title 12, section 601, subsection 1;

(3) Land, buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation; or

(4) Dams;

B. The ownership, maintenance or use of any building acquired by a governmental entity for reasons of tax delinquency, from the date of foreclosure and until actual possession by the delinquent taxpayer or the taxpayer's lessee or licensee has ceased for a period of 60 days; or

C. The ownership, maintenance or use of any building acquired by a governmental entity by eminent domain or by condemnation until actual possession by the former owner or the owner's lessee or licensee has ceased for a period of 60 days;

3. DISCHARGE OF POLLUTANTS. A governmental entity is liable for its negligent acts or omissions in the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere

or any water course or body of water, but only to the extent that the discharge, dispersal, release or escape complained of is sudden and accidental.

4. ROAD CONSTRUCTION, STREET CLEANING OR REPAIR. A governmental entity is liable for its negligent acts or omissions arising out of and occurring during the performance of construction, street cleaning or repair operations on any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of those ways including, but not limited to, street signs, traffic lights, parking meters and guardrails. A governmental entity is not liable for any defect, lack of repair or lack of sufficient railing in any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway or in any appurtenance thereto.

Minn. Stat. Ann. § 3.736. Tort claims.

Subdivision 1. General rule. The state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment or a peace officer who is not acting on behalf of a private employer and who is acting in good faith under section 629.40, subdivision 4, under circumstances where the state, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function. Nothing in this section waives the defense of judicial or legislative immunity except to the extent provided in subdivision 8.

* * * *

Subd. 3. Exclusions. Without intent to preclude the courts from finding additional cases where the state and its employees should not, in equity and good conscience, pay compensation for personal injuries or property losses,

the legislature declares that the state and its employees are not liable for the following losses:

(a) a loss caused by an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule;

(b) a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused;

* * * *

Miss. Code Ann. § 43-37-9. Reimbursement of expenses in cases of inverse condemnation

Where an inverse condemnation proceeding is instituted by the owner of any right, title or interest in real property because of use of his property in any program or project in which federal and/or federal-aid funds are used, the court, rendering a judgment for the plaintiff in such proceeding and awarding compensation for the taking of property, or the state's attorney effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or the state's attorney, reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceeding.

N.C. Gen. Stat. § 40A-2(7). Definitions

As used in this Chapter the following words and phrases have the meanings indicated unless the context clearly requires another meaning:

* * * *

(7) "Property" means any right, title, or interest in land, including leases and options to buy or sell. "Property" also includes rights of access, rights-of-way, easements, water rights, air rights, and any other privilege or appurtenance in or to the possession, use, and enjoyment of land.

N.C. Gen. Stat. § 40A-51. Remedy where no declaration of taking filed; recording memorandum of action

(a) If property has been taken by an act or omission of a condemnor listed in G.S. 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed the owner of the property, may initiate an action to seek compensation for the taking. The action may be initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later. The complaint shall be filed in the superior court and shall contain the following: the names and places of residence of all persons who are, or claim to be, owners of the property, so far as the same can by reasonable diligence be ascertained; if any persons are under a legal disability, it must be so stated; a statement as to any encumbrances on the property; the particular facts which constitute the taking together with the dates that they allegedly occurred, and; a description of the property taken. Upon the filing of said complaint summons shall issue and together with a copy of the complaint be served on the condemnor. The allegations of said complaint shall be deemed denied; however, the condemnor within 60 days of service summons and complaint may file answer thereto. If the taking is admitted by the condemnor, it shall, at the time of filing the answer, deposit with the court the estimated amount of compensation for the taking. Notice of the deposit shall be given to the owner. The owner may apply for

disbursement of the deposit and disbursement shall be made in accordance with the applicable provisions of G.S. 40A-44. If a taking is admitted, the condemnor shall, within 90 days of the filing of the answer to the complaint, file a map or plat of the property taken. The procedure hereinbefore set out in this Article and in Article 4 shall be followed for the purpose of determining all matters raised by the pleadings and the determination of just compensation.

(b) The owner at the time of filing of the complaint shall record a memorandum of action with the register of deeds in all counties in which the property involved is located. The memorandum is to be recorded among the land records of the county. The memorandum of action shall contain:

(1) The names of those persons who the owner is informed and believes to be or claim to be owners of the property;

(2) A description of the entire tract or tracts affected by the alleged taking sufficient for the identification thereof;

(3) A statement of the property allegedly taken; and

(4) The date on which owner alleges the taking occurred, the date on which said action was instituted, the county in which it was instituted, and such other reference thereto as may be necessary for the identification of said action.

(c) Nothing in this section shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property.

Tenn. Code Ann. § 29-20-201. General rule of immunity from suit—Exception

(a) Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.

(b)(1) The general assembly finds and declares that the services of governmental entity boards, commissions, authorities and other governing agencies are critical to the efficient conduct and management of the public affairs of the citizens of this state. Complete and absolute immunity is required for the free exercise and discharge of the duties of such boards, commissions, authorities and other governing agencies. Members of boards, commissions, authorities, and other governing agencies must be permitted to operate without concern for the possibility of litigation arising from the faithful discharge of their duties.

(2) All members of boards, commissions, agencies, authorities, and other governing bodies of any governmental entity, created by public or private act, whether compensated or not, shall be immune from suit arising from the conduct of the affairs of such board, commission, agency, authority, or other governing body. Such immunity from suit shall be removed when such conduct amounts to willful, wanton, or gross negligence.

(c) When immunity is removed by this chapter any claim for damages must be brought in strict compliance with the terms of this chapter.

Tenn. Code Ann. § 29-20-205. Removal of immunity for injury caused by negligent act or omission of employees—Exceptions

Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury:

(1) Arises out of the exercise or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

* * * *

W. Va. Const. art. VI, § 35. State not to be made defendant in any court

The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

W. Va. Code Ann. § 29-12A-4. State not to be made defendant in any court

(a) The distinction existing between governmental functions and proprietary functions of political subdivisions is not affected by the provisions of this article; however, the provisions of this article shall apply to both governmental and proprietary functions.

(b) (1) Except as provided in subsection (c) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss of persons or property allegedly caused by any act or omission of the political subdivision or any employee of the political sub-

division in connection with a governmental or proprietary function: Provided, That this article shall not restrict the availability of mandamus, injunction, prohibition, and other extraordinary remedies.

* * * *

Wyo. Stat. Ann. § 1-26-516. Action for inverse condemnation

When a person possessing the power of condemnation takes possession of or damages land in which he has no interest, or substantially diminishes the use or value of land, due to activities on adjoining land without the authorization of the owner of the land or before filing an action of condemnation, the owner of the land may file an action in district court seeking damages for the taking or damage and shall be granted litigation expenses if damages are awarded to the owner.

Wyo. Stat. Ann. § 1-39-104. Granting immunity from tort liability; liability on contracts; exceptions

(a) A governmental entity and its public employees while acting within the scope of duties are granted immunity from liability for any tort except as provided by W.S. 1-39-105 through 1-39-112. Any immunity in actions based on a contract entered into by a governmental entity is waived except to the extent provided by the contract if the contract was within the powers granted to the entity and was properly executed. The claims procedures of W.S. 1-39-113 apply to contractual claims against governmental entities.

(b) When liability is alleged against any public employee, if the governmental entity determines he was acting within the scope of his duty, whether or not alleged

to have been committed maliciously or fraudulently, the governmental entity shall provide a defense at its expense.

(c) A governmental entity shall assume and pay a judgment entered under this act against any of its public employees, provided:

(i) The act or omission upon which the claim is based has been determined by a court or jury to be within the public employee's scope of duties;

(ii) The payment for the judgment shall not exceed the limits provided by W.S. 1-39-118; and

(iii) All appropriate appeals from the judgment have been exhausted or the time has expired when appeals may be taken.

(d) A governmental entity shall assume and pay settlements of claims under this act against its public employees in accordance with W.S. 1-39-115, 1-41-106 or 1-42-107.

Wyo. Stat. Ann. § 1-39-105. Liability; operation of water vehicles, aircraft and watercraft

A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any motor vehicle, aircraft or watercraft.

Wyo. Stat. Ann. § 1-39-106. Liability; buildings, recreation areas and public parks

A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or

maintenance of any building, recreation area or public park.

Wyo. Stat. Ann. § 1-39-107. Liability; airports

(a) A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of airports.

(b) The liability imposed pursuant to subsection (a) of this section does not include liability for damages due to the existence of any condition arising out of compliance with any federal or state law or regulation governing the use and operation of airports.

Wyo. Stat. Ann. § 1-39-108. Liability; public utilities

(a) A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employes while acting within the scope of their duties in the operation of public utilities and services including gas, electricity, water, solid or liquid waste collection or disposal, heating and ground transportation.

(b) The liability imposed pursuant to subsection (a) of this section does not include liability for damages resulting from bodily injury, wrongful death or property damage caused by a failure to provide an adequate supply of gas, water, electricity or services as described in subsection (a) of this section.

Wyo. Stat. Ann. § 1-39-109. Liability; medical facilities

A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting

within the scope of their duties in the operation of any public hospital or in providing public outpatient health care.

Wyo. Stat. Ann. § 1-39-110. Liability; health care providers

(a) A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of health care providers who are employees of the governmental entity, including contract physicians who are providing a service for state institutions, while acting within the scope of their duties.

(b) Notwithstanding W.S. 1-39-118(a), for claims under this section against a physician employed by the state of Wyoming based upon an act, error or omission occurring on or after May 1, 1988, the liability of the state shall not exceed the sum of one million dollars ($1,000,000.00) to any claimant for any number of claims arising out of a single transaction or occurrence nor exceed the sum of one million dollars ($1,000,000.00) for all claims of all claimants arising out of a single transaction or occurrence.

Wyo. Stat. Ann. § 1-39-112. Liability; peace officers.

A governmental entity is liable for damages resulting from tortious conduct of peace officers while acting within the scope of their duties.